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QUESTIONS PRESENTED

1. Should *Hans* v. *Louisiana* be overruled and the Eleventh Amendment interpreted in accordance with its language?

2. Can a parent be reimbursed for tuition expenses he reasonably incurred in sending his handicapped son to a private, special needs school, while the administrative process was deciding what placement was appropriate?

3. Does the Education of All Handicapped Children Act (EHA), which was enacted to assure equal protection of the laws, abrogate states' immunity from suit?

4. Where the administrative procedures that were followed violated the EHA's rules concerning delay and partiality, was it permissible for the district judge to reimburse for resulting out-of-pocket expenses?

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Table of Abbreviations

CB = Central Bucks School District
J.A. = Joint Appendix
RA = Record Appendix (in three bound volumes as submitted by the state and CB to the Third Circuit Court of Appeals)

STATEMENT OF THE CASE

Alex's First Twelve Years

Robert Alexander Muth ("Alex") was born in 1970 and lived with his parents in Pennsylvania until he was 6 and his mother took Alex with her to her native country of Colombia, South America (J.A. 300). He was with his mother for more than three years (J.A. 301), then his father, the respondent, brought him back to Pennsylvania.[1] When he entered the Central Bucks school district ("CB") in 1980, Alex was a "tall, blond, tanned handsome boy who seem[ed] very self-conscious and unsure of himself"—a likeable 10 year old, who made friends easily and enjoyed sports (J.A. 304; RA II at 289). From the outset it was clear that he was learning disabled and that there was an unusually large disparity between his performance and verbal skills (J.A. 276, 286, 289-90). He had the short term memory typical of a child about half his age, could not write his name, and did not know months, days of the week, seasons, directions (RA II at 290).[2] "His uncertainty and difficulty seems to be accompanied by striking sensitivity, a kind of controlled, embarrassed frustration, and a somewhat depressed helpless manner" (RA II at 289).

At the outset it was recommended that Alex's placement for the coming year should provide "an extensive remedial speech and language experience, part of which will probably entail individual speech and language therapy . . . If feasible, private

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[1] When Alex first returned, he did not speak English, but he relearned English quickly. From the beginning it was clear that his academic difficulties were not solely the product of his unfamiliarity with the English language (J.A. 307, 323; RA II at 289-90). As a witness for CB testified, his increasing familiarity with American language and culture may have been responsible for much of the limited progress Alex made while at CB (J.A. 352; RA II at 295).

[2] He had "striking difficulty in responding to even general questions and verbal situations. He is uncertain about identifying right and left sides, body parts, naming pictures or figures, responding to simple requests . . ." (RA II at 289).

school alternatives should be explored" (RA II at 291-92). "Time would seem critical, given his age, the evidence of superior nonverbal ability, and what appears to be a relatively severe language disorder and the very limited academic skills he now possesses" (RA II at 292).

Nonetheless Alex was sent to the public school, placed in Kutz Elementary School in the CB School District, in a learning disability ("LD") resource room (J.A. 274a). He was mainstreamed only for *non*-academic subjects: art, physical education, lunch, and recess with the 5th grade; music and library with the 4th grade (J.A. 274a). He was given few if any special services.[3]

From the first, Alex had difficulties adjusting to the special classrooms to which he was assigned, which over the next 3 years would include both classrooms classified as "LD resource room" and classrooms denominated "self-contained."[4] Alex reacted badly to being classified as a "special needs student" in a regular public school (J.A. 290-91). In March, 1981, the psychologist for the school district reported "Alex was . . . spontaneous and open in discussing his life experiences and concerns. A predominant theme [was] . . . his discomfort with being in a Special Education class, inquiry regarding how long he would have to remain in this environment and confusion

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[3] The September 30, 1980 IEP lists only "speech" and does not specify whether it involved one on one instruction, how often it was offered, and whether the instructor was a specialist or simply the regular classroom teacher (J.A. 274a). Moreover, Muth requested but never received psychological counseling for Alex (J.A. 402-03).

[4] A witness for the school district described a self-contained classroom as "[an arrangement] where [Alex] basically stayed in that room for all of his major subject areas and only left that room for art, music, physical education" (J.A. 194). Alex was permitted more freedom of movement in a resource room since he "had the ability to move between the two different learning disability classrooms," (J.A. 190), but he remained separated from most of the children at the school, who were not handicapped.

about why he was there in the first place . . ." (J.A. 278-79). "Alex claims that he has lost potential friends because of his placement, as the other children tend to call him 'retarded'" (J.A. 279). "An undercurrent of loneliness and insecurity permeated Alex's responses and conversation . . . . [He has] a negative sense of self regard and its outward manifestation of being placed in a Special Education Program. He sees himself as a flawed child whose faults are the basis of major difficulties in his life and their remediation his prime concern at the present time" (J.A. 279-80).

The "'evidence of a poor or insecure self concept'" (J.A. 305) only increased during his tenure at CB. The next year the school psychologist reported "a young man with diminished self esteem as well as some depressive qualities" (J.A. 287). He "feels that he 'doesn't have any friends'" and in addition feels that "other children are 'smarter than me,'" "he wishes he were in the 'total regular class,'" says that "he thinks he is best 'at nothing,'" and "things would be better if 'I had a whole new life'" (J.A. 287). Indeed, because of his depression he had been mainstreamed at the Kutz School for two subjects in the fall of 1981, but "problems necessitated a return to the LD Program on a full time basis" (J.A. 285).[5] The school psychologist suggested "consideration [of] placement in a private school" and "strongly recommended" "involvement in a professional counseling milieu" (J.A. 287-88).[6]

Not only did Alex have persistent self image problems in the segregated special needs classrooms, but also his academic progress was very disappointing. In 1982 school authorities tested his IQ, and Alex scored 139 performance and 98 verbal,

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[5] Alex experienced difficulty keeping pace in the regular class and was reluctant to perform in class (J.A. 285).

[6] The next year as well a school diagnostic consultant found a severely depressed youngster whose depression and lack of motivation interfered with his education (J.A. 290-92, 359).

for an overall IQ score of 120 (J.A. 284).[7] These results revealed very superior intellectual functioning in *non*-verbal areas, yet Alex remained a boy who "cannot say, sing or write the alphabet" without omitting five or six letters and mixing up the sequence; who cannot rhyme words; and who (at age 12) could not correctly write numbers beyond 36 or count orally beyond 50 (RA II at 236-39). Alex's low performance was not limited to testing situations; also "in general verbal interaction . . . he had difficulty framing sentences and retrieving information. Alex often appears to be frustrated in this regard . . ." (RA II at 295).[8]

Over the years, professionals had on occasion raised the possibility of private school placement, due to Alex's unusual profile, the severity of his language deficits, and his emotional discomfort with the separate classrooms for special needs children in the regular public school (J.A. 287-88, 354, 357; RA II at 292). The school district had not acted on these recommendations, citing the preference for educating handicapped youngsters with the nonhandicapped, a federal and state policy that favors mainstreaming (J.A. 228).

March 1983-September 30,1983—Mainstreaming, A Retreat, And An Impasse

The conflict that developed into litigation commenced in June 1983. Beginning in March, Alex had been mainstreamed for

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[7] The extent of the disparity between these two measures of intelligence is highly unusual, and was not shared by any of the children in his LD classrooms at CB (J.A. 203-04).

[8] Not surprisingly Alex's high frustration level interfered with his learning (J.A. 290-92; RA II at 284). The school psychologist continued to report "a severe discrepancy between his ability and his academic achievement" (J.A. 291). By the spring of 1983, Alex, then 13, was reading at a 4.9 (high fourth grade) level, reading orally at only a third grade level, and earning a written language score of 3.9 (J.A. 310-11; RA II at 277), although he was "capable of understanding the *content* of age and/or grade level written material (J.A. 292)," and understood much better when read to orally (RA II at 278-84).

two academic subjects[9] in accordance with his continuing requests[10] and because his father was worried about the depression he was continuing to experience in the special needs classroom (J.A. 294-95), 363-64). CB agreed to the proposal—despite some skepticism that the mainstreaming could be successful (J.A. 374)—because of "Alex's current depressed emotional state . . . [and a] need for this child to feel some degree of normalcy" (J.A. 295, 359-60, 363, 387). By June all agreed that mainstreaming had again been unsuccessful (J.A. 365-66), but they could not agree upon what placement and what services should follow.

CB proposed returning Alex to the classroom setting he had been in until March, with no academic mainstreaming and a program similar to what had been provided from the outset (J.A. 218-220, 329-30, 378-79, 389; RA II at 220). Muth, knowing that program also had been unsuccessful, wanted to try something different: he exercised his parental right to participate in the selection of his child's educational placement, *see* 20 U.S.C. § 1400(c), by informing CB that he wished to educate his son outside of the district at Landmark School, a boarding school in Massachusetts that specializes in remediating language deficits similar to Alex's (J.A. 261-62, 272; RA I at 682-88, 703). Muth told CB that he did not think the education it was offering was "appropriate" within the meaning of the EHA, which guarantees every handicapped child a free and appropriate education (RA I at 277), *see* 20 U.S.C. § 1400(c). In accordance with federal law,[11] Muth asked that Alex's individual education plan ("IEP") (which the EHA mandates for each

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[9] The school agreed to mainstream Alex in two academic subjects —English and science—while keeping him in the resource room for reading and math (J.A. 293a).

[10] Recently Alex had again expressed a desire to be "placed in the 'team'" for instruction in various subjects (J.A. 291, 359-60, 363-64, 371).

[11] *See* 20 U.S.C. § 1415(e)(3).

handicapped child) not be altered pending the hearing officer's decision (RA II at 300); that was his position until September 6 when he asked that school officials meet with him to prepare an IEP after all (J.A. 331).

During the summer Muth tried to arrange an appropriate education for Alex for the coming school year. In September Alex attended CB for two days and then enrolled at Landmark. The due process hearing was held on September 30.

September 30-October 31—The Due Process Hearing And Decision

The hearing officer, Vernard Trent, heard testimony about Alex's problems adjusting to the public school (J.A. 344, 349, 357), his problems of self image and depression (J.A. 346, 359-60, 363-64, 366-67), the limited progress he had made (J.A. 361, 376, 395), and the difficulty he had encountered getting services (J.A. 337-38, 340-41, 377, 383, 387-88, 392-93, 398-99). Muth also testified that his son was doing better at Landmark, which was more specialized than the CB classrooms (J.A. 407-08). Alex did make significant academic progress at Landmark, learning for the first time such important skills as how to express himself in writing (J.A. 259-60, 322-23; RAI at 692). Landmark seemed also to be dealing successfully with Alex's emotional problems RA III at 466, 486-87, 491-92, 498, 501, 508, 509-11).

Trent's decision, rendered October 31, validated Muth's concerns with the CB placement. He concluded "[t]he program (SD-2, SD-5) advocated by the school district is appropriate relative to classification [learning disabled] but inappropriate relative to effectiveness and efficiency" (J.A. 424-25). It appears that the hearing officer considered Landmark the preferable placement,[12] although he did not actually

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[12] In recommending a more restrictive environment, the hearing officer referred to materials describing Landmark's program (P2), as well as to two reports that recommend private placement (J.A. 423). CB's Exception 11 to Trent's decision suggests it believed Trent had ordered placement at Landmark: the "Hearing Officer improperly accepted the recommendations of Dr. Adamson for private school placement of the student" (*See infra* p. 2b.).

order it.[13] Instead he gave as his Recommendation A:

> That the Central Bucks School District, immediately, meet with the parents of Robert Alexander Muth to discuss and explore alternative placement in a more restrictive educational setting according to 22 Pa. Code 13.11. The student has not made appreciable gains in reading (SD-10, N.T.60) and socio-emotional difficulties seemingly have been exacerbated by the current placement (N.T. 22-23-74-88-89-102-133-156-157-166, SD-14). Programmatic changes have not alleviated the emotional distress or facilitated the acquisition of the necessary academic, social, and vocational skills. (J.A. 425)

In any event Trent unambiguously found that the proposed program did not adequately meet Alex's needs for remedial services, which Muth also sought in the hearing, as he had over the years.[14] Trent found, for example, that "[a]lthough the speech and language IEP (SD-6) addresses the auditory perceptual dysfunction, this information has not been translated into instructional strategies and classroom activities" (J.A.

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[13] Perhaps the reason is that Pennsylvania law seems to require that the hearing officer give only a recommendation and not an order *(RA I at 243)*, although that procedure seems clearly illegal under the EHA, *see* 20 U.S.C. § 1415(b) (Pet'n for Cert. at 92a). Another possible reason is that Muth, proceeding pro se, had not perceived the necessity of introducing actual evidence concerning the appropriateness of Landmark so as to make an affirmative case for placement there, as the school district repeatedly noted. The only evidence Muth introduced was his own testimony and the report of a psychiatrist who had done a thorough study and recommended Landmark (RA I at 41). In finding the proposed program inappropriate, Trent relied primarily upon evidence CB introduced, consisting mostly of testimony of the district's own employees.

[14] The hearing officer found that Muth had experienced difficulty getting services provided, for example: "Alexander [whose problem all agree is auditory perceptual dysfunction] had been in the Central Bucks School District two and one half (2½) years before receiving a central auditory processing evaluation (N.T. 164)" (J.A. 417). The school finally agreed to provide the auditory exam only because of "parental insistence" (J.A. 420).

speech and language IEP (SD-6) addresses the auditory perceptual dysfunction, this information has not been translated into instructional strategies and classroom activities" (J.A. 421); that there remained a "significant lag in scholastic achievement" (J.A. 419), despite strong intellectual functioning (J.A. 418-419, 423); and that social and emotional concerns had not been adequately addressed: "Behavioral success and adjustment was not evident in either the self contained room nor the resource room" (J.A. 422). Accordingly, Trent recommended, in addition to Recommendation A above, that "the significant auditory perceptual dysfunction addressed through the speech and language IEP be translated into instructional strategies and classroom activities (SD-3-SD-4)," (Recommendation B) (J.A. 426), that "socio-emotional difficulties be addressed through intensive counseling" (Recommendation C) (J.A. 426), that vocational counselling be explored (Recommendation D) (J.A. 426), and finally that the program developed address Alex's "potential to function within the mentally gifted range and provide special activities or services not ordinarily provided in the regular program . . . ." (Recommendation E) (J.A. 426), thus addressing Alex's strengths as well as his deficits.

January-October 1984—The Secretary Of Education's Review and Remand

Both parties filed exceptions to Trent's decision, and the attorney for CB informed Muth that the recommendations would not be followed until the review process was completed *See infra* p. 1a.[15] Two months later, on January 23, 1984, the then Secretary of Education ruled that because Trent had not

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[15] CB further contended that "the progress made by Robert Alexander Muth . . . was superior" (CB Brief in Support of Exceptions at 5). This stance was identical to CB's position at the hearing—that Alex was receiving an appropriate education (J.A. 332, 334, 405). At the hearing, a representative of CB concluded that "[Alex] is making excellent progress with the program we have implemented for him" (RA II at 61 See also R.A. II at 41).

found the district *unable* to provide an appropriate education, he would remand to the school district and give it another chance to produce an appropriate plan (J.A. 435-37).

The secretary rationalized this approach by saying that the hearing officer had not passed on the appropriateness of the plan the school district proposed in *June* of 1983 (RA II at 220) and had only passed on the appropriateness of a program like the March IEP calling for academic mainstreaming (J.A. 435). He so found even though when Trent found "the program was appropriate relative to classification but not relative to efficiency . . ." he cited to both the March IEP (SD-2) *and* the June recommendation that academic mainstreaming be abandoned (SD-5) (J.A. 424).[16] Moreover, both Trent's findings described above and the transcript of the hearing (J.A. 378-79, 389; RA II at 32, 49, 58) show the issue was the adequacy of the school district's proposal for the next year and not simply the propriety of academic mainstreaming (on which the parties were in agreement.)[17]

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[16] The June recommendation provides in full: "Alex would benefit from increased involvement in the LD program. Continue to monitor Alex for appropriate areas for mainstreaming. IEP revisions to occur in September" (RA II at 220). Moreover, in its brief in support of exceptions to the hearing officer's report, CB wrote that it had "discharged its burden of introducing both the March, 1983 program and its recommendations for the 1983-84 school year" (CB Brief in Support of Exceptions at 3). (*See also* J.A. 219-20, 338, 378-79 (putting in issue the IEP that would be in effect).) Finally, Trent stated that he had four different IEPs before him (J.A. 415).

[17] The school district has occasionally tried to create the impression that Muth *prevented* it from preparing an appropriate IEP by exercising his statutory right not to have the placement changed pending litigation. This explanation ignores Muth's September 6, 1983 request that they go forward (J.A. 331). More fundamentally, the inability to change an IEP (which can never be done without the parents' consent or an administrative or judicial order) does not bar a school authority from proposing an appropriate program at the hearing, and a hearing officer can order any program proposed by any party or even some

The Secretary thus sent Muth through another round in the administrative process. On March 28, the school team met and made proposals for a revised IEP (RA II at 333-34); on April 26 they met with Muth and heard his suggestions and objections (RA II at 336-37); on May 1 they embodied their proposal, which reflected some of Muth's suggestions, into a proposed IEP (RA I at 36; RA II at 338); and on July 24, 1984 that IEP was upheld as appropriate by Vernard Trent—the same hearing officer who had found for Muth the previous October (J.A. 463-64). Trent found in July that "the *substantial adjustments* (SD-18) to the IEP and program offered . . . *now* describe an appropriate program of special education" (emphasis added) (J.A. 464).[18] The next October the Secretary of Education upheld Trent's July ruling "that the modifications and adjustments which [CB] . . . made to the March 28, 1984 IEP constituted an appropriate program," (RA I at 223), and the controversy finally moved out of the administrative process and into the courts.

Judicial Review

Muth had objected earlier that he should not have to undergo a second round of the administrative process (RA I at 294), and in April, 1984, he filed a complaint in the federal district court for the Eastern District of Pennsylvania against both CB and the state educational agency (J.A. 10). In June, 1986, the court granted Muth's motion for summary judgment, holding that

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plan that he himself creates. For the 1986-87 school year, for example, the school district introduced a proposed program that Muth had not approved, and that did not reflect the status quo (J.A. 233). Nonetheless, that plan was subsequently held appropriate (Pet'n for Cert. at 182a-83a).

[18] Earlier he said, "The conclusions of law delineated in the September 30, 1983 hearing remain intact with the following exception; the *adjustments* to the IEP *now coalesce* to indicate an educational program (SD-18) which appears to be effective and efficient . . ." (emphasis added) (J.A. 463).

Pennsylvania had violated the EHA in three ways: first, the original appeal to the Secretary was illegal because a decision rendered by a state hearing officer, as was the October 1983 decision, cannot be administratively reviewed under the terms of the EHA, *see* 20 U.S.C. § 1415(e)(1); second, the Secretary should not have been permitted personally to hear the appeal because he was an employee of the state educational agency and therefore not impartial as that term is defined in the EHA; and third, the Secretary's remand was illegal under the Act, which requires that the decision of a reviewing officer be "final", 20 U.S.C. § 1415(e)(1). *See Muth* v. *Smith*, 646 F. Supp. 280, 284-85 (E.D.Pa. 1986).

In a separate opinion, the district court held that the revised IEP that CB proposed in April, 1984 would have provided an appropriate education for Alex (Pet'n for Cert. at 156a). Nevertheless, it found both CB and the Commonwealth liable for reimbursement of the tuition Muth had paid for the 1983-84 school year, because "[t]he flaws in the administrative process applied in this case caused the whole process to drag on for over a year" (Pet'n for Cert. at 165a-166a). It rejected the petitioner's defense that the Eleventh Amendment barred a reimbursement award against it (Pet'n for Cert. at 177a).

The Third Circuit affirmed the award of reimbursement for 1983-84 tuition, concluding that the district court could reimburse Muth because the delays in the administrative process which caused the expenses were due to the illegal remand and also because the Secretary was not an impartial reviewing officer. *See Muth* v. *Central Bucks School Dist.*, 839 F.2d 113, 123-25 (3d Cir. 1988). Pet'n for Cert. at 48a-49a). Further, it agreed that the EHA abrogates the Eleventh Amendment, and that the state was liable for reimbursement. *See id.* at 128-30.

SUMMARY OF THE ARGUMENT

This case arises under the Education for all Handicapped Children Act, 20 U.S.C. §§ 1400 et. seq. (the "EHA"). The central substantive purpose of the Act is to assure that all

handicapped children be provided "a free appropriate public education which emphasizes special education . . . designed to meet their unique needs . . ." 20 U.S.C. § 1400. As this Court observed in *Board of Education* v. *Rowley*, 458 U.S. 176, 205 (1982), the Act's substantive goals are largely achieved through "the elaborate and highly specific procedural safeguards embodied in § 1415."

On one level this case concerns reimbursement of tuition paid by a father searching for an appropriate education for his handicapped son. But on another level, it involves the question whether children with handicaps will receive the education Congress has promised them. It also concerns whether parents of handicapped children can participate effectively in decisions concerning their child's education.

The respondent placed his son in a private special needs school while the administrative process was determining what placement was appropriate for him. The case differs from this Court's unanimous *Burlington School Committee* decision because here a program that the school district proposed was ultimately held to be appropriate, and the school district was thereby relieved of the obligation to finance the private placement. But the school district's program in this case was not held appropriate until July 1984, and the tuition reimbursement that the lower courts have ordered covers only the academic year that ended before then. Moreover, the school district proposal that was eventually held appropriate was not even formulated until the end of April, when the academic year was drawing to a close. When the proposal was upheld, it was *called* the "1983-1984 IEP," but it was not available for that school year. Accordingly, Muth deserves reimbursement under the principle of *Burlington*.

Alternatively one can justify the reimbursement award on the theory explicated by the courts below and award tuition reimbursement based on petitioner's substantial violations of EHA procedures. The EHA requires that each state recipient institute a specific system of procedural safeguards through

which the substantive rights conferred by the Act are to be defined, *see* 20 U.S.C. § 1415; the procedures used by Pennsylvania in Alex's case directly violated the EHA and produced not a definition of Alex's rights, but rather delay and partiality. *See* Part IV.

The EHA establishes rules that are somewhat unusual for administrative agencies; it specifically mandates that hearing and review be conducted by an impartial decisionmaker, see 20 U.S.C. § 1415(b)(2), who is not "an employee of such agency . . . involved in the education or care of the child." Nonetheless, Pennsylvania permitted its Secretary of Education—the state official directly in charge of its school system—to adjudicate Muth's dispute with the school district. In addition, the Secretary substantially delayed the decisionmaking by remanding the case, in direct contravention of the Act's requirement of "finality." The partiality and extended delay prevented Muth from obtaining a prompt resolution. It is only for the period of illegal delay that Muth has been awarded tuition reimbursement.

To grant reimbursement against the state petitioner, of course, this Court must hold that the EHA abrogates Eleventh Amendment immunity. This presents no obstacle, however, since Congress enacted the EHA pursuant to § 5 of the Fourteenth Amendment and clearly stated its intent to abrogate immunity. *See* Part III. In 1986 Congress removed any doubt from the issue by passing the Rehabilitation Act amendments, which specifically abrogate the Eleventh Amendment in suits brought under any statute which, like the EHA, "prohibit[s] discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a)(1). In so doing, Congress merely reiterated what had already been clear. As enacted in 1975, the EHA was an ambitious federal-state cooperative program premised on ultimate state responsibility. *See, e.g.*, 20 U.S.C. § 1412(6). Most important, it expressly gave parents an enforceable right of action in federal court against the only possible parties in EHA suits—local school districts and the states. *See* 20 U.S.C. § 1415(a), (b), (c), (e)(2).

ARGUMENT

I. THIS COURT SHOULD OVERTURN *HANS* v. *LOUISIANA* IN ORDER TO RECONCILE THE ELEVENTH AMENDMENT WITH ITS LANGUAGE AND ITS HISTORY.

This case, like *Pennsylvania* v. *Union Gas Co.*, 832 F.2d 1343 (3d Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988) (No. 87-1241), argued earlier this Term, presents the Court with the opportunity to rationalize the basis of its Eleventh Amendment-sovereign immunity doctrine. With a unanimity that is rare among legal academics, scholars agree that "Eleventh Amendment theory" is flatly inconsistent with the language and history of the amendment and does not make sense.[19] Moreover, what is known of the intent of the enacters clearly accords with the language of the amendment and not with the construction that currently prevails.

Recent scholarship makes clear that the Eleventh Amendment, enacted in response to *Chisholm* v. *Georgia*, 2 U.S. (Dall.) 419 (1793), was intended to remove the jurisdiction of the federal courts in cases brought against a state by citizens of

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[19] *See, e.g.*, C. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 150-64 (1972); Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1466 (1987) ("the Court has misinterpreted the Federalist Constitution's text, warped its unifying structure, and betrayed the intellectual history of the American Revolution that gave it birth."); Fletcher, *A Historical Interpretation of the Eleventh Amendment*, 35 Stan. L. Rev. 1033, 1034 (1983) ("[a]s a historical matter [the Court's] view of the amendment is mistaken."); Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 125-26 (1988); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. Pa. L. Rev. 515, 538-46 (1977); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1891 (1983); *see generally* J. Orth, *The Judicial Power of the United States* (1987).

another state.[20] Some of the Constitution's framers had not considered Article III to grant that jurisdiction, but in *Chisholm* the Court held it did make that grant, in its "state-citizen diversity clause." The Eleventh Amendment was promptly enacted to overturn that ruling.

The plain meaning of the Eleventh Amendment's words accords with this history, and the amendment was applied in accordance with this construction for ninety-five years after its enactment, *see* Brief for Resp. at 20-21, *Union Gas*, *supra* p. 14, until the Supreme Court in *Hans* v. *Louisiana*, 134 U.S. 1 (1890), adopted the interpretation that has since prevailed.[21] *Hans* was a clear departure from both the language and the intended meaning of the Eleventh Amendment.

From two holdings in *Hans*—that the Eleventh Amendment enacts a principle of states' sovereign immunity and that it applies equally to cases that are not included within the amendment's terms—this Court over the years has built a complicated and elaborate jurisprudence that has produced universal criticism.[22] *Stare decisis* might be sufficient reason to adhere

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[20] *See, e.g.*, Amar, *supra* note 19, at 1467-84; Fletcher, *supra* note 19, at 1034 ("[T]he amendment merely required a narrow construction of constitutional language affirmatively authorizing federal court jurisdiction and [] the amendment did nothing to prohibit federal court jurisdiction."); *see also id.* at 1045-63; Gibbons, *supra* note 19, at 1920-41; Jackson, *supra* note 19, at 13-51; J. Orth, *supra* note 19, at 28-29 (advocating a return to the plain meaning of the text).

[21] *Hans* was an expedient solution to the problem the Court faced in enforcing monetary judgments against Southern states shortly after Reconstruction. *See* Gibbons, *supra* note 19, at 1973-2002; J. Orth, *supra* note 19, at 79-81, 153-60.

[22] *See, e.g.*, H. Fink & M. Tushnet, *Federal Jurisdiction: Policy and Practice* 137 (1984) (noting "the theoretical incoherence of eleventh amendment jurisprudence"); Fletcher, *supra* note 19, at 1044 ("The result of the Court's expansive reading of the scope of the eleventh amendment's prohibition and of the Court's use of fictions

to those holdings were it not for the extremely awkward and occasionally absurd theoretical framework that *Hans* has necessitated. The reason to overturn *Hans* is precisely to clarify and rationalize both Eleventh Amendment jurisprudence and the law of states' immunity. No *results* need change with the overturning of *Hans*, for the Court if it wishes can accomplish precisely the same results on a nonconstitutional level through its doctrine of comity. The results in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), and the Eleventh Amendment clear statement cases, for example, could be grounded upon a general judicial reluctance to find implied rights of action against the states, *see, e.g.*, *Thompson* v. *Thompson*, 108 S. Ct. 513, 520-23 (1988) (Scalia, J., concurring in the judgment).[23]

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and exceptions to limit the impact of that prohibition is a complicated, jerry-built system that is fully understood only by those who specialize in this difficult field."); Amar, *supra* note 19, at 1473 (stating, with regard to the Court's present interpretation of the Eleventh Amendment: "All of this is, in a word, nonsense."); Wolcher, *Sovereign Immunity and the Supremacy Clause*, 69 Calif. L. Rev. 189, 195, 197, 210-12 (1981) (remarking that the "curious rules" of the Eleventh Amendment and an "elaborate structure of fiction and artifice" force plaintiffs to "negotiate . . . through judicial avoidance doctrines."); Jackson, *supra* note 19, at 119 (calling *Hans* and its progeny "a body of law that has for many years been rightly condemned as anomalous and inconsistent, both internally and with respect to the basic constitutional norms by which we like to believe we are governed").

[23] The rule of *Edelman* v. *Jordan*, 415 U.S. 651 (1974), could survive, so that states would remain responsible for prospective relief, because they have no legitimate interest in refusing to comply with the demands of the Federal Constitution once it is established what those demands are, *see Ex parte Young*, 209 U.S. 123 (1908), but they would remain responsible for retroactive relief such as damages only when Congress has explicitly addressed the need to hold their treasuries accountable. That may not be the only balance that could be struck between federal and state interest, but it is one reasonable resolution, providing a discernible line between the allowable and the

Chief Justice Rehnquist once stated that sovereign immunity must be of constitutional dimension, even though it is not literally included in Article III or the Eleventh Amendment, because "[its] derogation would undermine the logic of the constitutional scheme." *Nevada* v. *Hall*, 440 U.S. 410, 439 (1979) (Rehnquist, J., dissenting).[24] But if sovereign immunity

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forbidden. That line has a long and relatively consistent progeny dating from the earliest applications of sovereign immunity doctrine, *see Poindexter* v. *Greenhow*, 114 U.S. 270 (1885); *United States* v. *Lee*, 106 U.S. 196 (1882); *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). Although the Court could of course reexamine this or any other aspect of sovereign immunity theory, there is no reason the *Edelman* rule cannot survive under a comity approach to sovereign immunity as readily as under a constitutional one.

[24] Similarly, four Justices in *Welch* v. *Texas Dep't of Highways and Pub. Transp.* 107 S.Ct. 2941 (1987), expressed fear that rejecting the *Hans* rationale would overrule "at least 17 cases, in addition to *Hans* itself," *id.* at 2956 n.27. In fact, the change in rationale need overturn none of those holdings, all of which could be upheld under doctrines of "Our Federalism" and comity that this Court has already adopted. *See, e.g.*, Jackson, *supra* note 19, at 119-24 (explaining how a rejection of *Hans'* rationale does not compel overturning any of the cases listed by the plurality in *Welch);* Fletcher, *supra* note 19, at 1131 (arguing that acceptance of the historical view "may not significantly change the actual results that are now achieved. But, even in those cases where the actual result is not greatly different, [following the historical understanding] may permit us to see more clearly what is at issue and to ask directly questions about the extent of federal power to provide remedies against unconsenting states that are now asked covertly and awkwardly. The achievement in the short run may not be so much practical as intellectual. But what is at stake may be more than that, for in the long run, the integrity and possibly the stability of our legal system depend in important part on the ability of the judiciary to understand and articulate the real grounds for its decisions,"); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. Pa. L. Rev. 1203, 1261-80 (1978) (explaining why overturning the rule of *Hans* would not require different results in any of the Supreme Court's cases.)

were protected under the same or similar doctrines counselling judicial restraint before holding states liable, especially for retroactive relief, it is difficult to see how the scheme would be disrupted.[25] Indeed even the result in *Hans* itself could remain, on the ground that the Constitution does not create a federal cause of action to enforce the Contract Clause. *See, e.g., Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 299-300 (Brennan, J., dissenting); Field, *supra* note 24, at 1265-68.

At most overturning *Hans* will alter the tone of the analysis, allowing the Court to reach its results by speaking through the doctrine of comity, which is arguably more sensitive and adapt-

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[25] Logic would suggest that the chief consequence of whether or not immunity is constitutionally based would be whether or not Congress, acting under its Article I powers, can lift the states' immunity without their consent. But this Court has followed the practice of imputing consent to the states whenever Congress validly exercises its power to regulate, *see Employees of the Dep't of Pub. Health and Welfare of Missouri* v. *Department of Pub. Health and Welfare*, 411 U.S. 279, 283-84 (1973), and if that continues, there already is no difference in result between the constitutional and the judicial restraint rationales for immunity. Indeed in the area of congressional waiver, it is the *Hans* theory of the Eleventh Amendment as a bulwark of sovereign immunity that threatens to "undermine the logic of the constitutional scheme," for if sovereign immunity is the states' constitutional right, how can Congress waive it? But to deny that Congress has power to subject a state to suit in the federal courts under legislation enacted pursuant to Article I would be in direct conflict with one of the most fundamental tenets of the Constitution: that the power of Congress and the federal courts is coextensive. *See* Brief for Resp. at 28-31, *Union Gas*, *supra* p. 14; *see also Osborn* v. *Bank of the United States*, 22 U.S (9 Wheat.) 738, 818-19 (1824); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 391-92 (1821); *The Federalist* No. 80, (C. Rossiter ed. 1961) at 476 (A. Hamilton) ("If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number.").

able to current needs. As Professor Shapiro has said, speaking of this Court's decision in *Pennhurst State School and Hospital* v. *Halderman*, 465 U.S. 89 (1984),

> [T]he eleventh amendment and sovereign immunity are inappropriately blunt instruments for dealing with these delicate matters . . . . Other, more precise instruments better suited to cope with those problems were available to the Court—in particular, nonconstitutional doctrines of restraint based on principles of deference to a state's interest in administering its own laws and in having a fair opportunity to interpret those laws when their meaning is in doubt.

Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 Harv. L. Rev. 61, 79 (1984). The added flexibility of a comity approach might better address the appropriate balance between federal and state interests than would a more rigid constitutional doctrine.[26] *Smith* v. *Robinson*, 468 U.S. 992 (1984), provides an example of the advantages of retaining a certain flexibility in this area. In that case, the federal district judge had certified state law questions to the state supreme court in order to avoid inconsistency with federal law; the state court construed its law, under threat of obvious federal illegality, to avoid the federal issues. This Court noted that, because of *Pennhurst*, it was wrong of the district court to award relief under state law, *see id.* at 1002 n.6. That result belies considerations of federal-state comity; following the *Pennhurst* rule in such situations would force a judge to hold a state law unconstitutional, whereas the sensible

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[26] *See Matthews* v. *Rodgers*, 284 U.S. 521, 525 (1932) (noting that the principle of comity expresses "[t]he scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations"); *see also* Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 580-85 (1985) (defending federal courts' use of comity to decline to hear cases within their jurisdiction in order to avoid undue interference with states).

solution sometimes is to resolve state law questions—or even as here to let the state resolve them through certification.[27]

A comity doctrine could be sufficiently flexible to allow the court to respond to factors involved in each case. Principles of federal judicial restraint in regulating state government can be applied on a case by case basis, allowing the particular balance of state and federal interests to control, *see, e.g., Rizzo* v. *Goode*, 423 U.S. 362, 378-80 (1976); *Fair Assessment in Real Estate Assn.* v. *McNary*, 454 U.S. 100, 107-13 (1981), or it can be used to evolve a set of rules that will apply in a category of litigation, as this Court has done in *Younger* v. *Harris*, 401 U.S. 37 (1971) and progeny, and in the category of rules it has devised to govern officials' immunity in § 1983 actions, *see, e.g., Pulliam* v. *Allen*, 446 U.S. 522 (1984).[28]

In *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122, 202-203 (1819), Chief Justice Marshall wrote:

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[27] Nonetheless the *Pennhurst* rule, like all of the Court's rules developed under the name of constitutional sovereign immunity, would presumably continue under a comity theory. Indeed, the principal *Pennhurst* holding—that federal courts cannot hold states accountable in suits brought by private individuals on the basis of state law—in some ways seems simply a reformulation of the familiar rule of *Smith* v. *Reeves*, 178 U.S. 436 (1900). Despite *Pennhurst*, a state that affirmatively consented to suit, under the stringent requirements of *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U.S. 459 (1945), is still amenable to federal jurisdiction on the basis of federal law; *Smith* v. *Reeves* holds that states can consent to suits against themselves and limit their waiver of immunity to state court. Clearly a federal court should take jurisdiction over a state cause of action by a private individual against the state only with a state's explicit waiver of its immunity in federal court—the rule that prevails under *Smith* v. *Reeves* and the rule of *Pennhurst* as well.

[28] *Pullman* abstention, *see Railroad Comm'n of Texas* v. *Pullman*, 312 U.S. 496 (1941), is another product of judicially-created comity.

> [I]f, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.

Recent scholarship has demonstrated that, far from being a monstrous absurdity, the Eleventh Amendment means what it says and constitutes a straightforward withdrawal of jurisdiction in the suits the amendment names.

Decision of *this* case, in any event, should be the same whether or not *Hans* is overturned, for Congress acting under the Fourteenth Amendment, where it plainly has power to abrogate states' immunity, has clearly expressed its intention that states should be liable to reimburse parents who have had to pay for an appropriate education for their handicapped child. The Education of the Handicapped Act satisfies the clear statement requirement whether that rule is viewed as constitutionally compelled or whether it results from considerations of comity.

II. MUTH DESERVES REIMBURSEMENT UNDER THE EHA AND THE RULE OF *BURLINGTON SCHOOL COMMITTEE* v. *MASSACHUSETTS DEPARTMENT OF EDUCATION*.

1. Rather than leave to courts difficult constitutional questions regarding the educational rights of handicapped children[29] and the rights of their parents to participate in decisions about that education,[30] Congress took the initiative in the

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[29] *Compare Plyler* v. *Doe*, 457 U.S. 202 (1982) (Equal Protection Clause requires access to an education) *with San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1 (1973) (Equal Protection Clause does not require an *equal* education).

[30] *Cf. Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

EHA.[31] As reenacted in 1975, the EHA "establishes an enforceable substantive right to a free appropriate public education." *Smith* v. *Robinson*, 468 U.S. 992, 1010 (1984). Through federal-state cooperation, Congress sought to achieve two goals: to "assure that all handicapped children have available to them . . . a free appropriate public education," and to protect "the rights of . . . parents or guardians" to participate in the determination of what education is appropriate for their child. *See* 20 U.S.C. § 1400(c). The second of these goals is both important in its own right[32] and as a means of enforcing the child's right to appropriate education.[33]

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[31] *See, e.g.*, 1975 S.Rep. 168, 94th Cong., 1st Sess., at 9, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1433 ("It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity. It can no longer be the policy of the Government to merely establish an unenforceable goal of requiring all children to be in school."); 120 Cong. Rec. 15269 (remarks of Sen. Matthias) ("why should the Congress stand idly by while court action is heaped upon court action? *Why should we leave it up to the judicial branch to affirm the Constitution?*") (emphasis added).

[32] *See Honig* v. *Doe*, 108 S.Ct. 592, 598 (1988) (noting that while "aware that schools had all too often denied such children appropriate educations without in any way consulting their parents, Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness"); 131 Cong.Rec. H9971 (daily ed. Nov. 12, 1985) (remarks of Rep. Miller) ("Parents' involvement in the education of the handicapped child is not only essential to the task, it is a right specifically included in the law.").

[33] *See* 1975 S.Rep. 168, 94th Cong., 1st Sess., at 11-12, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1435-36 ("By changing the language [of the provision relating to individualized educational programs] to emphasize the process of parent and child involvement . . ., the Committee intends to clarify that such individualized planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child.").

The pivotal nature of the parental role arises from the process by which the education appropriate for each child is determined. Congress wisely eschewed attempting to formulate a single substantive standard of education for the wide spectrum of handicapped children whom the Act protects. *See Hendrick Hudson Dist. Bd. of Educ.* v. *Rowley*, 458 U.S. 176, 189 (1982).[34] Yet, recognizing that "schools had all too often denied such children appropriate educations," Congress also refused to grant school systems unfettered discretion to decide what education to provide each child. *See Honig* v. *Doe*, 108 S. Ct. 592, 598 (1988); *see also id.* at 604. Instead, "[t]he 'free appropriate public education' required by the Act is tailored to the unique needs of the handicapped child by means of an 'individualized educational program' (IEP)." *Rowley*, 458 U.S. at 181-82 (*quoting* 20 U.S.C. § 1401(18)). The IEP is a product of a cooperative effort among the educational agency, the teacher, the parents, and the child. *See id.* at 182. It specifies not only the child's placement but also what services he will receive and with what frequency. *See* EHA Services, 34 C.F.R. § 300.346 (1987). Parental participation makes a substantive contribution because parents know their child in a way that school officials do not; the sharing of both perspectives is designed to produce an educational program that is more suitable than either could produce alone.

Parental participation is also a central enforcement mechanism of the Act. *See Rowley*, 458 U.S. at 208-209. Recognizing

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[34] Any attempt to formulate such a standard would undermine the individualized consideration that is indispensable to the proper education of a child. This Court has also declined to formulate a test:

> The determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act presents a more difficult problem. The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.

Rowley, 458 U.S. at 202.

that parents and school officials would not always agree about what education is appropriate, "Congress . . . establishe[d] various procedural safeguards that guarantee parents . . . an opportunity for meaningful input into all decisions affecting their child's education." *Honig*, 108 S.Ct. at 598. Most important, the state must establish a system for impartial "due process review" of the child's program to which parents may appeal in the event of disagreement with school officials. *See* 20 U.S.C. § 1415(a), (b). And if parents remain dissatisfied with the program after exhausting this administrative review, they may file a complaint in either federal or state court, which can conduct de novo review and "shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2).

2. In *Burlington School Committee* v. *Massachusetts Dep't of Educ.*, 471 U.S. 359, 370 (1985), the Court held that courts may in an appropriate case award tuition reimbursement to parents for expenses reasonably incurred during the process of review. The parents in *Burlington* were not content with the program the town offered, and while they challenged that placement they enrolled their son in a program they thought more suitable. *See id.* at 362. After extensive litigation, their view of the appropriate IEP was ultimately vindicated and they were awarded reimbursement of their out of pocket expenses in educating their child. *See id.* at 370, 374.

The *Burlington* Court unanimously rejected the contention that the EHA authorizes only prospective relief, holding instead that the availability of tuition reimbursement is necessary to achieve the Act's substantive goals. If tuition reimbursement were unavailable, the Court stressed,

> the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete. . . . Congress undoubtedly did not intend this result. . . .

Id. at 370. Without the possibility of reimbursement, many parents would have no choice but to leave their child in an inappropriate placement throughout the "ponderous" process

of review, and the child's and parents' rights would go unenforced.[35] Children with handicaps are not "nonperishable commodities" whose development can be put on hold while the litigation runs its course. *See Town of Burlington* v. *Department of Educ.*, 736 F.2d 773, 798 (1st Cir. 1984).

Moreover, if reimbursement were unavailable, the scheme of the Act would be severely disrupted because parents would be forced to seek review of the child's educational program or placement in the courts through preliminary injunctive relief. That relief would often be necessary to prevent harm to their child from languishing in an inappropriate placement. *See, e.g.*, *Monahan* v. *Nebraska*, 491 F.Supp. 1074, 1090-94 (D. Neb. 1980) (granting preliminary injunctive relief). For courts to rule first on these issues, however, would bypass the administrative process which Congress sought to establish as the usual first step in resolving such disputes.

3. Muth's claim for reimbursement falls within the *Burlington* rule even though the IEP first formulated on April 26, 1984 was *called* the 1983-84 proposal and was eventually held appropriate, because that plan was not available to Alex during the 1983-84 school year. In the autumn of 1983, when Alex started attending Landmark, the program the school district was proposing was substantially different from the April 26 proposal, *see supra* p. 10, and was inappropriate, as Hearing Officer Trent found, *see supra*, pp. 7-8.[36]

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[35] If only prospective relief were available, parents would be discouraged from pursuing relief through the administrative process, for the most they could expect would be an "empty victory [of having] a court tell them several years later that they were right but that these [tuition] expenditures could not . . . be reimbursed." *Burlington*, 471 U.S. at 370.

[36] Whether the product of partiality in the proceeding or of simple negligent error, the Secretary's later statement that Trent had passed only on the plan for academic mainstreaming is not defensible on the merits. Not only did Trent cite to the June proposal to place

Nor is this a case where the school district, once informed of the deficiencies in its proposed program, was willing to correct them. CB specifically informed Muth it would not follow Trent's recommendations pending its appeal,[37] and it also took the position, in the due process hearing (J.A. 332, 334; RA II at 61) and after it, that the education it had offered in the past was perfectly adequate, indeed it was "superior."[38] Even if the school district was *able* to offer an adequate education at that

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Alex in a more restrictive classroom setting in the public school when he held the school proposal inappropriate (*see, e.g.*, J.A. 424), but also the testimony of the witnesses shows they knew that more than academic mainstreaming was at issue (*see, e.g.*, J.A. 378-79; 389; RA II at 32, 49, 58). Indeed the parties agreed concerning the impropriety of academic mainstreaming (J.A. 365-66). Moreover, Trent also made findings as to inappropriateness that covered the *range* of classrooms Alex had attended at CB; for example, he found Alex suffered "emotional disturbance[s]" and referred to his experiences in the learning disabled classroom (SD-12, SD-13) as well as the school district's effort to mainstream (SD-14) (J.A. 423). It is indisputable that Trent found that certain services should be offered that had not been part of the program before (J.A. 426). Yet the June recommendation that the Secretary intimated might be adequate contained no suggestion that any new services would be provided (RA II at 220); the recommendation, which is set out in full above at note 16, does not speak to providing services at all but only to discontinuing the academic mainstreaming. No fair reading of Trent's October decision could conclude that he was simply ordering a return to the LD classroom in the public school.

[37] On November 28, 1983, the school district informed Muth that "[t]he district is under no obligation to implement any of the recommendations of the hearing officer until such time as the exceptions have been ruled upon." *Infra* p. 1a.

[38] *See Brief in Support of Exceptions* at 5. In its exceptions to the hearing officer's recommendations, the school district continued to maintain that "its proposal was both appropriate and adequate." *Infra* p. 3b.

time, it was not *willing* to do so.[39] Surely until another plan was proposed, Alex did not have the alternative of an appropriate education at CB. At least until April 26, 1984 (J.A. 207; RA I at 459, 462),[40] Muth had no reasonable alternative but to continue Alex's placement at Landmark.

Nor is there any question that in the absence of an adequate proposal by the school district, the Landmark placement met the requirements of appropriateness. The thrust of the school district's position was not that there was anything wrong with Landmark, but rather that the services Alex received there were unnecessary in light of the purported appropriateness of

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[39] Often a private school placement is necessary not because the school district *could not* meet the child's needs itself but because it *is not in fact* responding to the particular needs of the child. The reasons may be justifiable. Sometimes it does not make sense for each town to provide an appropriate education in its own schools for every child, no matter how unusual his learning profile. It may be more sensible for several communities to share resources and create an appropriate program or even to use a specialized private school to meet the need. Because instead of being community-based it serves children with like needs, a private school may be able to offer specialized services that are not available in a program serving a more diverse population. In other situations, the public schools could reasonably provide appropriate special education but do not; one accomplishment of the private school alternative is that it creates an incentive for school districts themselves to provide a richer format of programs so as to become truly suitable to a wider range of special needs children, where that is feasible.

[40] Even if Muth had instantly appreciated that the school district proposal now met the threshold of adequacy, it would not be appropriate to expect him instantly to remove his handicapped child from Landmark, where he had been having a successful year, rather than allow him to complete the last 6 weeks of the academic year. The tuition reimbursement that has been awarded covers only reimbursement for the period from September 14, 1983 until June 16, 1984. See p. 1c.

the program offered by Central Bucks.[41] Indeed the district court said that the Landmark program was "excellent and . . . may even be the best program for Alexander," and doubted only its necessity since the EHA does not require the "best" education but only an adequate one (Pet'n for Cert. at 182a-83a).[42] The only questions ever raised about the Landmark placement were (a) whether it was necessary in light of the availability of the program at Central Bucks and (b) whether placement there was undesirable given the statutory preference for mainstreaming (J.A. 228, 486b).

Of course, CB was not proposing mainstreaming either. But, technically, a separate school for special needs children, like Landmark, is considered a less desirable, "more restrictive" placement than a separate classroom in a "regular" public school. *See* 34 C.F.R. § 300.550(b)(1) (1987); 22 Pa. Code § 13.11. For Alex, however, the separate special needs classroom contributed to a feeling of stigmatization and a loss of self esteem and hampered his ability to learn (J.A. 181). If a child *needs* a "more restrictive placement" in order to learn, then that placement "meet[s] the unique needs of [this] handicapped child" and provides the "special education" the EHA requires. *See* 20 U.S.C. § 1401(16), (18); *Geis* v. *Board of Educ.*, 774 F.2d 575, 583 (3d Cir. 1985) (preference for mainstreaming does not

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[41] The statute provides for more restrictive private placement at public expense only when the school authorities do not have another appropriate proposal. *See* EHA Services, 34 C.F.R. § 300.403(b) (1987); 22 Pa. Code § 13.11.

[42] Indeed some of the school district witnesses themselves testified that Landmark is an excellent school for children who need language-based programs (J.A. 234-35). CB's program, in contrast, was not languaged-based (J.A. 421; RAI at 721). Much of the evidence indicated that Landmark was generally better suited to Alex's needs (J.A. 454-55; RA I at 695, 721, 723). Interestingly, in designing the 1986-87 IEP for Alex, CB borrowed the set of educational objectives that Landmark had employed in its 1983-84 IEP (RA I at 511-12) as well as a number of other features (RA I at 738).

trump requirement that education be appropriate for individual child).[43]

In sum Muth is entitled to reimbursement under the principle of *Burlington* because he reasonably incurred tuition expenses to obtain appropriate education for his son while the administrative process unfolded.

III. THE RULE OF *BURLINGTON* DOES NOT TURN UPON THE IDENTITY OF THE DEFENDANT.

Pennsylvania may not avoid its responsibility for reimbursement. *Burlington's* holding that the EHA authorizes reimbursement is dispositive regardless of whether the defendant is a state agency or a local school district because the EHA abrogates the states' Eleventh Amendment immunity. Congress enacted the EHA pursuant to § 5 of the Fourteenth Amendment,[44] and it is well-settled that, "when acting pursuant to § 5 of the Fourteenth Amendment, Congress can

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[43] *See* C. Meisel, *Mainstreaming Handicapped Children* (1986); S. Kirk & J. Gallagher, *Educating Exceptional Children* (1979). Even though mainstreaming was not suitable for Alex, it can of course be beneficial, depending upon how it is structured, and also upon the personality and the disability of the particular child. When it is appropriate, it serves the interests not only of enabling the handicapped to gain experience functioning in the "normal" world, but also of lowering the barriers of segregation and allowing the non-handicapped to become acquainted with the handicapped.

[44] *See, e.g.*, 20 U.S.C. § 1400(b)(9) (stating that the EHA was passed "in order to assure equal protection of the law"); *see also* Van Pelt, *Compensatory Educational Services and the Education for All Handicapped Children Act*, 1984 Wisc. L. Rev. 1469, 1495-1500 (collecting references to equal protection in the legislative history of the EHA and concluding that "it is highly unlikely that the EAHCA may be viewed as anything other than a Section 5, fourteenth amendment enactment."). Pennsylvania does not contest that the EHA represents an exercise of Congress' enforcement power under the Fourteenth Amendment. *See* Brief of Pet. at 30.

abrogate the Eleventh Amendment without the States' consent." *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 238 (1985) (*citing Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976)). Congress manifested its intent to abrogate immunity by clearly stating so both in the 1986 amendments to the Rehabilitation Act and in the EHA and by establishing an elaborate federal-state cooperative program to define and enforce the Fourteenth Amendment rights of handicapped children—a program whose purposes require state liability for reimbursement.

Congress manifested its intent that states not be immune from suits under the EHA with sufficient clarity to satisfy the standard established in *Atascadero*. In *Atascadero*, the Court held that in order for a statute to subject states to suit, "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." 473 U.S. at 243. Applying this standard, the Court concluded that § 504 of the Rehabilitation Act (as codified at 29 U.S.C. § 794)—which nowhere specifically mentioned states—did not possess "the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Id.* at 245-46. Unlike the Rehabilitation Act at issue in *Atascadero*, the EHA contains the necessary "unequivocal statutory language."

A. The 1986 Amendments To The Rehabilitation Act Expressly Abrogate State Immunity From Suits Brought Under The EHA.

In 1986, Congress made states liable for tuition reimbursement to the parents of handicapped children. It did so by amending the Rehabilitation Act to overturn *Atascadero* with the following provision:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 794 of Title 29 . . . *or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.*

42 U.S.C. § 2000d-7(a)(1), Pub. L. 99-506, Title X, § 1003, Oct. 21, 1986, 100 Stat. 1845 (emphasis added). Because the EHA

"prohibit[s] discrimination by recipients of Federal financial assistance," this amendment expressly abrogates state immunity from suits for tuition reimbursement brought under the EHA. *See* 42 U.S.C. § 2000d-7(a)(1).[45]

It is clear that the EHA falls within the amendment's language. First, it prohibits discrimination against handicapped children. Indeed, the preamble of the Act states that its purpose was "to provide programs to meet the educational needs of handicapped children in order *to assure equal protection of the law.*" 20 U.S.C. § 1400(b)(9) (emphasis added).[46] Second, the EHA imposes this duty to prohibit discrimination on states choosing to receive federal financial assistance.[47] If the EHA is

[45] Although there is a conflict among the circuits concerning whether the EHA abrogates the Eleventh Amendment, *compare, e.g., David D.* v. *Dartmouth School Comm.*, 775 F.2d 411 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986) (holding that EHA abrogates immunity) *with, e.g., Doe by Gonzales* v. *Maher*, 793 F.2d 1470 (9th Cir. 1986), *aff'd on other grounds sub nom. Honig* v. *Doe*, 108 S. Ct. 592 (1988) (holding that EHA does not abrogate immunity), none of the circuits has addressed the effect of this amendment to the Rehabilitation Act on sovereign immunity.

[46] *See also, e.g., Smith* v. *Robinson*, 468 U.S. 992, 1010 (1984) (*quoting* S.Rep. No. 94-168, p. 13 (1975)) ("It is the intent of the [Senate] Committee to establish and protect the right to education for all handicapped children and to provide assistance to the States in carrying out their responsibilities under State law and the Constitution of the United States to provide equal protection of the laws."); *Rowley*, 458 U.S. at 189 ("[T]he face of the statute evinces a congressional intent to bring *previously excluded handicapped children* into the public education systems of the [participating] States.") (emphasis added).

[47] *See, e.g., Honig* v. *Doe*, 108 S. Ct. 592, 597 (1988) ("[T]he EHA confers upon disabled students an enforceable substantive right to public education in participating states and conditions federal financial assistance upon a state's compliance with the substantive and procedural goals of the Act.") (citation omitted); *Rowley*, 458 U.S. at 180-81 (*quoting* 20 U.S.C. § 1412 (1)) ("In order to qualify for *federal financial assistance* under the Act, *a State must demonstrate that it 'has in effect a policy that assures all handicapped children the right to a free appropriate public education.'*") (emphasis added).

not a "Federal statute prohibiting discrimination by recipients of Federal financial assistance," no federal statute is.[48] Therefore, this amendment must abrogate state immunity from EHA suits; otherwise, its last clause would be rendered meaningless.[49]

B. The Text Of The EHA As Enacted In 1975 Also Clearly Provides For Suit Against the States.

The text of the EHA as enacted in 1975 reveals a congressional intent to abrogate states' immunity from suits for tuition reimbursement. The EHA is replete with references to the

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[48] This amendment—which was passed by a unanimous vote in both Houses, *see* 132 Cong.Rec. S15101 (daily ed. Oct. 3, 1986) (remarks of Sen. Hatch); *id.* at H2425 (daily ed. May 7, 1986)—reflects Congress' intent in enacting the EHA originally in 1975. *See, e.g., id.* at S12096 (daily ed. Sept. 8, 1986) (remarks of Sen. Weicker, floor sponsor of amendment) (stating the amendment "*clarifies the intent of Congress* where violations of section 504 by recipients of Federal financial assistance are concerned. [It] provides that states shall not be immune under the 11th amendment from suit in Federal court for violations of section 504 of the Rehabilitation Act, *or other Federal statutes prohibiting discrimination.*") (emphasis added). Although the amendment became effective after Muth initially filed suit, *see* 42 U.S.C. § 2000d-7(a)(2), the overwhelming support for the amendment shows that it reflects Congress' intent in originally enacting the EHA. In any event, the clear language of the amendment settles the issue of state immunity from EHA suits for all future cases.

[49] *Cf. Hutto* v. *Finney*, 437 U.S. 678, 698 n.31 (1978) (holding that 42 U.S.C. § 1988 evinced a congressional intent to abrogate state immunity in part because "[i]f the Act does not impose liability for attorney's fees on the States, it has no meaning with respect to them."); *Quern* v. *Jordan*, 440 U.S. 332, 345 (1979); *Employees of Dep't of Pub. Health and Welfare of Missouri* v. *Department of Pub. Health and Welfare*, 411 U.S. 279, 285-86 (1973).

states,[50] and by its terms it (1) subjects the states to suit, (2) contemplates the necessity for state liability for reimbursement, and (3) places on states overall responsibility for the Act's administration.

1. Unlike *Atascadero*, where the statutory language at issue did not include mention of states, this case involves a statute which expressly subjects states to suits in federal court. Section 1415 of the EHA provides for a detailed system of procedures designed to safeguard the rights of handicapped children and their parents. In its first opportunity to interpret the EHA, the Court described the § 1415 procedure as follows:

> [T]he Act imposes extensive procedural requirements upon *States* receiving federal funds under its provisions. Parents or guardians of handicapped children must be notified of any proposed change in "the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child," and must be permitted to bring a complaint about "any matter relating to" such evaluation and education. §§ 1415(b)(1)(D) and (E). Complaints brought by parents or guardians must be resolved at "an impartial due process hearing," and appeal to the state educational agency must be provided if the initial hearing is held at the local or regional level. §§ 1415(b)(2) and (c). Thereafter, "[a]ny party aggrieved by the findings and decision" of the state administrative hearing has "the right to bring a civil action with respect to the complaint . . . in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." § 1415(e)(2) [ellipses in Court's opinion].
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> *Thus, although the Act leaves the States the primary responsibility* for developing and executing educational

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[50] *See, e.g.*, 20 U.S.C. §§ 1400(b)(8), (b)(9); 1401(a)(6); 1406(a); 1411(a)(4), (a)(5), (b)(1), (b)(2), (c)(1), (c)(2), (c)(3), (c)(4), (d), (e)(2), (g)(1), (g)(2); 1412(1), (2), (3), (4), (5), (6), (7); 1413(a)(1), (a)(2), (a)(4), (a)(5), (a)(9), (a)(12), (b), (c); 1414(a), (b)(1), (b)(2), (b)(3), (c)(1), (c)(2), (d), (e), (f); 1415(a), (b)(2), (c), (e)(3); 1416(a), (b)(1); 1418(a); 1419(a), (b).

> programs for handicapped children, *it imposes significant requirements to be followed in the discharge of that responsibility. Compliance is assured [in part] . . . by the provision for judicial review.*

Rowley, 458 U.S. at 182-83 (emphasis added) (footnotes omitted).[51] This recognition that "the provision for judicial review" contemplated state defendants in district courts in order to assure compliance is buttressed by the fact that the only *possible* parties in an EHA dispute are "handicapped children and their parents," "any local educational agency," and "[a]ny *State* educational agency." *See* 20 U.S.C. § 1415(a) (emphasis added); *see also* 20 U.S.C. § 1415(b), (c).[52]

2. The EHA does not merely subject states to suit in federal court; it also imposes liability on them for "such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). A unanimous Court in *Burlington* had no doubt that this language encompassed and contemplated tuition reimbursement:

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[51] *See also* 1985 H.R. Rep. 296, 99th Cong., 1st Sess., at 6 ("[I]n some actions in which the parents or guardian prevail, more than one local or *State* agency may be named as respondent") (emphasis added); 121 Cong. Rec. 37415 (remarks of Sen. Williams) (primary author of the EHA) ("In addition, it should be clear that a parent or guardian may present a complaint alleging that a *State* or local educational agency has refused to provide services to which a child may be entitled") (emphasis added).

[52] Petitioner artfully employs ellipses to remove from 20 U.S.C. § 1415 the clear references to states and to their inclusion as proper defendants in actions brought by parents. *See* Brief of Pet. at 37. Petitioner has radically altered the meaning of § 1415(e)(2) by substituting the phrase "[made in the administrative process]" for the provisions which call attention to subsections (b) and (c)—the subsections which expressly include the states as authorized defendants—and by deleting altogether the provisions referring to the original filing of a complaint by the parents against the state or local agencies. *See id.* By its actual terms, § 1415(e)(2) instructs that it be considered in conjunction with the remainder of § 1415; together they clearly and expressly contemplate federal suits brought by private plaintiffs against state defendants.

> Absent other reference, the only possible interpretation [of these words] is that the relief is to be "appropriate" in light of the purpose of the Act.
>
> . . . [If reimbursement were not available,] the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete [emphasis in original]. Because Congress undoubtedly did not intend this result, *we are confident that by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case.*

471 U.S. at 369-70 (emphasis added).[53] In conclusion, the Court stressed that "[t]he Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives." *Id.* at 372.

Moreover, the meaning of "appropriate" relief must not turn upon the identity of the defendant. Irrespective of whether the defendant is a local or state agency, "appropriate" relief must be interpreted "in light of the purpose of the Act." *Id.* at 369. And the possibility of reimbursement from some party is necessary to achieve this purpose. *See id.* at 369-70. Consequently, fashioning a distinction between local agencies and state agencies, and making the former liable for tuition reimbursement and the latter immune—a distinction made nowhere in the EHA—would undermine the purposes of the EHA in the many situations in which reimbursement will not be available from a local defendant.[54]

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[53] Reimbursement, of course, is a remedy to be granted not automatically but only after "balancing the equities of the particular case." *Jenkins* v. *Florida*, 815 F.2d 629, 631 (11th Cir. 1987).

[54] In a struggle to distinguish *Burlington*, petitioner claims that the right to a free appropriate education could be complete without the prospect of tuition reimbursement from the state and that construing "appropriate relief" to allow only prospective relief would

The EHA itself contemplates that local defendants will not be involved in all cases. Often it either permits or requires the states directly to run a special education program without the participation of local agencies. First, the state is required only to expend seventy-five percent of its EHA funding through local agencies; it can administer the other twenty-five percent itself. *See* 20 U.S.C. § 1411(c). In Missouri, for example, the state educational agency directly administers the schooling of at least 3000 handicapped children. *See St. Louis Developmental Disabilities Treatment Center* v. *Mallory*, 519 F. Supp. 1416, 1421 (W.D.Mo. 1984), *aff'd*, 767 F.2d 518 (8th Cir. 1985). Moreover, a state is permitted under § 1411 to select a group of handicapped children—for example, the severely retarded or the emotionally disturbed—and regulate their education itself. *See, e.g., id.* (noting that "profoundly handicapped youngsters" are educated in Missouri state schools). Second, a state is not *permitted* to employ a local agency in the event that the local agency is entitled to less than $7500 of EHA funds[55] or when the local agency has not submitted the complex application or detailed plan as required by § 1414. *See* 20 U.S.C. § 1411(c)(4)(A). In all these situations, the state *must* run the EHA program itself. *See* 20 U.S.C. § 1411(c)(4)(B).[56] Reimbursement

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adequately protect the interests of handicapped children. *See* Brief of Pet. at 53-54. This argument applies equally to suits where the defendant is a local agency and is the precise argument that this Court unanimously rejected in *Burlington*, *see* 471 U.S. at 370. Moreover, if petitioner were correct, it would not have been necessary for Congress to have provided *any* statutory authorization for suit against states; prospective relief would be available under *Ex parte Young*, 209 U.S. 123 (1908), and *Edelman* v. *Jordan*, 415 U.S. 651 (1974), even without any congressional action.

[55] Under Pennsylvania's figures, this results when the area served by the local agency contains fewer than twenty-five to thirty handicapped children. *See* Brief of Pet. at 51 n.11.

[56] It is thus possible under the Act for a state to structure the local agencies in such a way that many of them not be entitled to EHA

would then be wholly unavailable if the state were immune; and "the child's right to a *free* appropriate public education . . . would be less than complete." *Burlington*, 471 U.S. at 370 (emphasis in original).

Even in situations in which a local agency can be named as a defendant, reimbursement against the state is still necessary, for five reasons, to achieve the EHA's goals. First, the EHA requires that the state ensure that local agencies meet the Act's provisions. *See* 20 U.S.C. § 1412(6). If the states were immune from suit, they would lose their incentive to force localities to comply.[57] *See generally infra* pp. 38-39. Second, challenges to implementation of the EHA sometimes involve only a challenge to state policy,[58] thus rendering it inappropriate to hold

funds, thereby permitting the state to control those funds directly. *Cf. Gary A.* v. *New Trier High School Dist. No. 203*, 796 F.2d. 940, 945 n.9 (7th Cir. 1986) ("Illinois could have established a single state agency to control all public education instead of establishing local school districts. By doing so it might have conferred eleventh amendment immunity on that agency."); *See Amicus* Brief of ACLU *et al.* at 8-9.

[57] States now sometimes join with the parent in suing the locality to force compliance with the EHA. *See, e.g., Alamo Heights Independent School Dist.* v. *State Board of Education*, 790 F.2d 1153 (5th Cir. 1986). The threat that the Secretary of Education might withdraw funding pursuant to 20 U.S.C. § 1416 is not sufficient to ensure state vigilance. The Secretary is not charged with detecting individual violations, and it is not likely that even clear violations in isolated cases of which he was aware would lead to withdrawal of funds, *see* 20 U.S.C. 1416(a)(1) (providing that the Secretary's power to withhold funds attaches when "there has been a failure to comply *substantially* with any provision of section 1412 or section 1413") (emphasis added). The mechanism to ensure an appropriate education in *every* case is instead the elaborate IEP procedure, with its provisions for administrative and judicial review. *See supra* pp. 23-24.

[58] *See, e.g., Parks* v. *Pavkovic*, 753 F.2d 1397 (7th Cir. 1985) (challenging state policy of making the "developmentally disabled" contribute to costs of residential placement); *Crawford* v. *Pittman*, 708 F.2d 1028 (5th Cir. 1983) (challenging state policy of providing no more than 180 days of education per year).

the locality liable.

Third, given the states' control over the implementation of the EHA, in many cases the state, and not the local agency, will be responsible for an inappropriate IEP; if the state were immune, however, only the locality would be sued.[59] The local agency could then claim, as CB does in this case, that *it* did nothing to deprive the child of his right under the EHA and should not be forced to bear the monetary burden of remedying the state's violation. If the local agency could thus escape liability for reimbursement by pinning the blame for its default on an immune state, the potential would exist for an end run around *Burlington*.[60]

Fourth, in certain situations, the local agency itself may be considered an arm of the state for Eleventh Amendment purposes. *See, e.g., Garcia* v. *Board of Educ. of Socorro Consolidated School District*, 777 F.2d 1403, 1407 (10th Cir. 1985), *cert. denied*, 107 S. Ct. 66 (1986). If the state were immune, the availability of reimbursement could vary according to how the state structures its educational system. *See Gary A.* v. *New Trier High School Dist. No. 203*, 796 F.2d 940 n.9 (7th Cir. 1986). This would impermissibly allow states to extend their own sovereign immunity under the Act and would irrationally place the effect of *Burlington* at their disposal. Fifth, if states were immune and no other defendant were available, parents could obtain preliminary injunctive relief in court, thus vitiating the EHA's procedural scheme. *See supra* pp. 25.

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[59] *Cf. Robert M.* v. *Benton*, 671 F.2d 1104, 1105 (8th Cir. 1982) (state and school district are both defendants even though alleged violation resulted from state procedures).

[60] Unlike CB (which did not offer Alex an appropriate education at least until April 26, 1984), sometimes the school district may be correct that it shares none of the blame, as in the cases cited *supra* note [58]. In those cases, the choice would be between denying any reimbursement and holding the locality responsible for the state's default.

In all of the above situations, the possibility of tuition reimbursement from the state was intended by Congress and is necessary to realize the EHA's goals.[61] For "conscientious parents who have adequate means . . . it would be an empty victory to tell them several years [after they sent their child to private school] that they were right but that [their] expenditures could not . . . be reimbursed," and this would deny to their child a free appropriate education. *See Burlington*, 471 U.S. at 370. This is a result that "Congress undoubtedly did not intend." *Id.*

3. Finally, Congress' manifest intent to abrogate state immunity is evinced by the entire structure of the EHA. The *state* must develop a plan for the education of the handicapped. *See, e.g.*, 20 U.S.C. § 1413. The *state* must implement and effectuate that plan, *see, e.g.*, 20 U.S.C. § 1412(1), (3), (5), and establish procedural safeguards, *see, e.g.*, 20 U.S.C. § 1415(a). The *state* must monitor the localities' compliance with provisions of that plan and oversee the operation of the procedural safeguards. *See, e.g.*, § 1414(b). And it is the *state* that is fully responsible for guaranteeing the substantive rights conferred on handicapped children and their parents by the EHA. *See* § 1412(6); *see also Smith* v. *Robinson*, 468 U.S. at 1010 ("The

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[61] Nor does the availability of reimbursement from the state in state court, which the EHA would seemingly impose, *but cf. Will* v. *Michigan Dep't of State Police*, 428 Mich. 540, 410 N.W.2d 749 (Mich. 1987), *cert. granted*, 108 S.Ct. 1466 (1988) (No. 87-1207) (argument heard on October 31, 1988 and decision pending), permit an interpretation of "appropriate relief" that exempts states from liability in federal court. The intent of the EHA is to allow the parties an unfettered choice between state and federal court by allowing the identical action in each forum—the statute, and § 1415 in particular, nowhere distinguishes between the remedies available in different courts. As the First Circuit has noted, "we do not think Congress envisioned having handicapped children's plans subject to double legal standards depending solely upon the aggrieved party's choice of forum." *David D.* v. *Dartmouth School Comm.*, 775 F.2d 411, 419 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986).

responsibility for providing the required education remains on the States.").

Given the clear congressional reliance on massive state involvement and ultimate state responsibility, it does not make sense to interpret the statute so that local agencies are liable but states are immune. The system plainly cannot work unless the state does its job. Yet petitioner's proposed interpretation would cause the responsibility to devolve upon the localities in violation of Congress' intent, for it would remove the incentive for the state to perform its monitoring and enforcement roles.[62] "[S]ince the state is responsible for guaranteeing that a child will receive both the substantive and procedural rights set forth in the Act, Congress intended that the state should be named as an opposing party, if not the sole party, to the proceeding." *David D.* v. *Dartmouth School Comm.*, 775 F.2d 411, 422 (1st Cir. 1985), *cert. denied.*, 475 U.S. 1140 (1986).

C. Congress' Attempt To Define And Enforce Handicapped Children's Rights Under The Fourteenth Amendment Should Not Be Judicially Obstructed Through An Unthinking Application Of A Rule Of Construction Adopted Ten Years After The EHA Was Written.

This Court has never held that a statute like the EHA, which *specifically authorizes* federal courts to adjudicate cases involving state defendants, does not abrogate states' sovereign immunity. Especially because the EHA was enacted under the Fourteenth Amendment, any such holding would be a radical departure from existing precedents.

The Rehabilitation Act at issue in *Atascadero*—the strictest case on the clear statement requirement and the case on which

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[62] From an economic perspective, a situation where one party has both the duty to monitor and the power to control the activities of another party presents the paradigmatic case for vicarious liability irrespective of the apportionment of blame. *See* S. Shavell, *Economic Analysis of Accident Law* 170-71 (1987).

petitioner principally relies—was substantially less clear than is the EHA in expressing a congressional intent to abrogate state immunity.[63] At the time of *Atascadero*, § 504 of the Rehabilitation Act provided that "[n]o otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, . . . be subjected to discrimination under any program or activity receiving Federal assistance," 29 U.S.C. § 794, and it authorized handicapped persons subjected to such discrimination to bring suit in federal court, *see* 29 U.S.C. § 794a. But nowhere did the statute mention the possibility of states' being named as defendants. In those circumstances, the *Atascadero* Court rejected the argument that because the states received federal financial assistance, § 504 abrogated states' immunity. *See* 473 U.S. 245-46.

The EHA, by contrast, specifically contemplates the possibility of complaints brought by parents against state agen-

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[63] Nevertheless, the rule of construction announced in *Atascadero* did not produce an accurate assessment of congressional intent. Congress superseded the decision in *Atascadero* by enacting—by a unanimous vote, *see supra* note 48—the Rehabilitation Act amendment discussed *supra* pp. 30-32. Similarly, in *Smith* v. *Robinson*, 462 U.S. 992 (1984), the Court, applying standard rules of construction, concluded that Congress did not intend for the EHA's elaborate scheme of procedures and remedies to be supplemented by those of the Rehabilitation Act and also applied rules of construction to hold that the EHA did not allow for awards of attorney's fees. Both of these holdings were swiftly and expressly overturned by Congress when it amended the EHA in 1986. *See* 20 U.S.C. § 1415(e)(4), (f) (as amended, Aug. 5, 1986). The history of these provisions and amendments reflects that Congress genuinely does intend to be generous in providing education to the handicapped—a service which many recognize as highly cost-effective in the long term, and which also is what the handicapped most require in order to redress their disability. In enacting the provision allowing attorney's fees in EHA actions, Congress showed an awareness that its provision would cost states money, and they nonetheless chose to impose this financial obligation. *See, e.g.*, 132 Cong. Rec. § 9278 (July 17, 1986); 131 Cong. Rec. H9971 (Nov. 12, 1985); 131 Cong. Rec. § 10398-99 (July 30, 1985).

cies, and it does so in the very section in which it authorizes parents to file those complaints in United States district courts. *See* 20 U.S.C. §§ 1415(a), (b), (c), (e)(2); *see also supra* pp. [32-35].[64] This creation of federal jurisdiction, moreover, is located in the same subsection as the authorization for federal courts to grant "appropriate" relief against the states, *see* 20 U.S.C. § 1415(e)(2), an authorization which this Court has held encompasses awards of retroactive reimbursement, *see supra* pp. 24-25. A statute enacted pursuant to the Fourteenth Amendment which contains this degree of clarity of intent to make states liable abrogates state immunity. *See Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 451-56 (1976).[65]

Further, in *Atascadero*, there was no danger that a holding that Congress had not abrogated the states' immunity would undermine the operation of the Rehabilitation Act. Unlike the EHA, under which the *only possible* defendants in a discrimination suit are state and local agencies, the Rehabilitation Act prohibits discrimination under "any program or activity receiving Federal financial assistance." 29 U.S.C. § 794. The states themselves are but a subset of such programs or activities; many entities besides states and besides governments may find

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[64] Petitioner's reliance upon *Quern* v. *Jordan*, 440 U.S. 332, *see* Brief of Pet. at 31-33, which held that 42 U.S.C. § 1983 does not abrogate state immunity, fails to appreciate the significance of the express authorization of suits against the states in the EHA's text. Section 1983, by contrast, does not mention—even indirectly—states as possible defendants. *See Quern*, 440 U.S. at 345.

[65] The authorization of suits against states in federal courts in the EHA is much more explicit than that in Title VII of the Civil Rights Act of 1964, codified as amended at 42 U.S.C. § 2000 *et seq.*, which this Court unanimously held to have abrogated the states' immunity, *see Fitzpatrick*, 427 U.S. at 452. In *Fitzpatrick*, the Court followed the clear meaning of Title VII in holding that it abrogates state immunity, even though it neither mentions the Eleventh Amendment nor refers directly to the possibility of state defendants. *See id.* at 451-56.

themselves liable under the Act—for example, commercial employers, *see Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 637 (1984), and non-profit institutions, *see Community Television of S. Calif.* v. *Gottfried*, 459 U.S. 498, 507 (1983). And unlike the EHA, the states are given no responsibilities for the implementation of the Rehabilitation Act. Thus, it was entirely possible that some members of Congress did not advert to state liability in enacting the Rehabilitation Act. The EHA, however, admits of no such possibility.[66]

The unanimous ruling in *Fitzpatrick* clearly shows that when a statute is enacted under the Fourteenth Amendment and reveals a manifest intent to subject the states to suit, that statute will be held to abrogate state immunity. *See* 427 U.S. at 451-56. Endorsement of petitioner's position would not be using a rule of construction to elucidate Congress' intent; rather, it would be actively cutting back upon a congressional program.

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[66] And the EHA *certainly* left no such doubts in 1975, at which time the Court applied what petitioner agrees was a "less stringent standard," Petition for Cert. at 35 n.6, in determining whether a statute abrogated state immunity. The case for abrogation is even clearer if the EHA is interpreted against the backdrop of the case law as it existed in 1975 when Congress passed the statute. It would ill-serve the Court's task of ascertaining Congress' intent in enacting the EHA rigidly to apply the *Atascadero* rule of construction to a statute written ten years before that rule was announced. *See Welch* v. *State Dep't of Highways and Pub. Transp.*, 107 S. Ct. 2941, 2958 (1987) (Scalia, J., concurring in part and concurring in the judgment) ("Even if we were now to find [a congressional assumption about Eleventh Amendment law] to have been wrong, we could not, in reason, interpret the statutes as though the assumption never existed."). *Cf. Procunier* v. *Navarette*, 434 U.S. 555, 562 (1978) (noting that officials "cannot be expected to predict the future course of constitutional law").

In short, there is nothing in the Eleventh Amendment or in any of this Court's decisions construing the amendment to prevent this complex, comprehensive, and impressively workable statute from being given its full and intended effect. *Burlington's* holding that reimbursement is both necessary to give the EHA its full effect and authorized by Congress therefore disposes of this case. Because Muth falls within the *Burlington* rule of reimbursement for reasonable tuition expenses made by a parent during a period when no appropriate education was available to his son, the Court need not reach the second issue on which certiorari was granted—whether the procedures Pennsylvania followed accord with the mandates of the EHA.

IV. AS AN ALTERNATE AND INDEPENDENT MATTER, MUTH SHOULD BE REIMBURSED FOR THE TUITION HE PAID DURING THE LENGTHY DELAY IN THE ADMINISTRATIVE PROCESS THAT WAS CAUSED BY PETITIONER'S VIOLATIONS OF EHA PROCEDURES.

A. This Court Need Not Reach The Partiality Issue Because Other Procedural Violations Which Have Been Established Below Are A Sufficient Basis For the Reimbursement That Was Ordered.

The court below held that the procedures followed in this case violated the EHA in a way that was harmful to Muth, *both* because the EHA disqualifies the Secretary as decisionmaker *and* because his decision was not "final" within the EHA requirement.[67] Petitioner sought certiorari only on the second

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[67] The district court held in addition that the procedure violated the EHA by allowing the decision of the original state hearing officer to be further reviewed within the administrative process, *see Muth* v. *Smith*, 646 F. Supp. 280, 283, 284 (E.D. Pa. 1986), a question the court of appeals did not reach because even without it the procedures used were illegal and harmful to Muth. *See Muth* v. *Bucks County*, 839 F.2d 113, 126 (3d Cir. 1988).

Pennsylvania's procedures allow the Secretary (or his designee) to conduct initial hearings, 22 Pa. Code §§ 13.32(2), 13.32(12), and also

ground, but the first is sufficient to dispose of the case.[68]

One important purpose of the EHA's procedural protections, which are at the heart of the Act,[69] is to prevent delay and allow a swift determination of the appropriate educational placement[70]—preventing the child from being held in limbo for long

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allow review by the Secretary, 22 Pa. Code § 13.32(24). On its face, this process violates the Act because a review is permissible only when the hearing is conducted on a local level. *See* 20 U.S.C. § 1415 (c); S.Conf.Rep. No. 455, 94th Cong., 1st Sess., at 49, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1480, 1502. In this case, the Secretary used the illegal review to order the illegal remand and impermissibly to delay the administrative process.

[68] The remand violated the EHA because it: (1) did not provide Muth with a "final" judgment as required by 20 U.S.C. § 1415(e)(1) and 34 C.F.R. § 300.512(b)(1); (2) exceeded the stringent time requirements of 34 C.F.R. § 300.512; and (3) obstructed access to judicial review as provided for in 20 U.S.C. § 1415(e)(2) and 34 C.F.R. § 300.511.

[69] *See Rowley*, 458 U.S. at 205 ("When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid."); *see also Jackson* v. *Franklin County School Bd.*, 806 F.2d 623, 630 (5th Cir. 1986) ("The formality of the Act's procedures is itself a safeguard against arbitrary and erroneous decision-making.").

[70] *See, e.g.*, 121 Cong.Rec. 37416 (Nov. 19, 1975) (remarks of Sen. Williams):

> . . . I cannot emphasize enough that delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development. The interruption or lack of required special education and related services can result in a substantial setback to the child's development. Thus, in view of the urgent need for prompt resolution of questions involving the education of handicapped children it is expected that all hearings and reviews conducted pursuant to these provisions will be commenced and disposed of as quickly as practicable consistent with fair consideration of the issues involved.

periods during which he should be receiving an appropriate education. The EHA procedures aim at allowing the parent who doubts the appropriateness of his child's placement to obtain a final administrative determination as quickly as possible so that he can accept it or, if necessary, seek judicial review. According to time requirements spelled out in contemporaneously promulgated EHA regulations, even an impartial and independent decisionmaker who *is* permitted to review the decision of an initial hearing officer must render his decision within 30 days of an appeal. 34 C.F.R. § 300.512(b). In this case, an appeal was first made by CB on November 14, 1983, so Muth should have had a final administrative decision by December 14, 1983, but because of the remand, Muth did not obtain his reviewable administrative order until October 24, 1984—almost 10 months later.[71]

The illegal remand in this case accounted for most of the delay. By remanding in violation of the Act, the Secretary initiated a second round of the administrative process that lasted an additional nine months. Accordingly the judgment below fully sustains Muth's award of reimbursement, as long as the state is a proper defendant, without this Court reaching the issue of impartiality on which certiorari was granted.

B. If This Court Addresses Impartiality, It Should Find That The Terms Of The EHA Remove The Act From The Administrative Law Paradigm And Disqualify The Secretary As a Reviewing Officer.

Impartiality and bias are difficult concepts to define and, in practice, unusually difficult to prove. Significantly,Congress

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[71] The petitioner seems to have missed the point that the EHA gives the parent and child a right to a swift administrative decision. When Muth ultimately obtained a final administrative order—long after the statute required—CB objected vigorously that *even then* Muth had not exhausted his administrative remedies (RA I at 29, 46, 52-53). Moreover, in Pennsylvania even the Secretary's decision does not comply with the EHA's finality requirement; either party is permitted to ask the Secretary to reconsider, *See* 1 Pa. Code § 35.241; RA I at 69.

did not leave the question of who is an impartial decisionmaker up to traditional administrative law doctrine or evidentiary hearings. The EHA's unique provisions pointedly relieve plaintiffs of the burden of showing partiality. Petitioner's appeal to principles of general administrative law principles is thus inapposite.

Section 615 of the EHA, entitled "Procedural Safeguards," provides the right to an "impartial due process hearing" to resolve complaints. 20 U.S.C. § 1415(b)(2). The statute reads: "No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child." *Id.; see also* 34 C.F.R. § 300.507(a)(1). In circumstances where an appeal is permitted, the state "shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review." 20 U.S.C. § 1415(c).[72] Federal regulations further prescribe that no hearing may be conducted "[b]y a person having a personal or professional interest which would conflict with his or her objectivity in the hearing." 34 C.F.R. § 300.507(a)(2).

The Senate Conference Report explains the impartial due process requirement:

> (b) . . . *the conferees point out that any hearings are not conducted by the agency itself, but rather at the appropriate agency level. The hearing will be conducted by an impartial hearing officer since the State or local agency or intermediate unit will be a party of any complaint presented.*

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[72] The regulations stipulate that hearing officers are not disqualified on the grounds that they are employees just because they are hired to perform this function. 34 C.F.R. § 300.507(b). The regulations also provide that state and local educational agencies may maintain a list of qualified and impartial hearing examiners. *Id.* at § 300.507(c). Both provisions create the unavoidable inference that it was anticipated that public agencies would look beyond their own members and to the outside for impartiality and independence.

> (c) no hearing may be conducted by an employee of the State or local educational agency involved in the education or care of the child. The conferees have adopted this language to clarify the minimum standard of impartiality which shall apply to individuals conducting due process hearings *and individuals conducting a review of the local due process hearing*; . . .[73]

S.Conf.Rep. No. 455, 94th Cong., 1st Sess., 49, *reprinted in* 1975 U.S.Cong.Code & Admin. News 1480, 1502 (emphasis added).

The review in this case violated the statutory scheme for four principal reasons. First, the review was conducted by "the agency itself." The State Secretary of Education, as the Department of Education's chief executive officer and policymaker, is the human embodiment of the agency itself. This is a critical distinction between the EHA and the classic administrative model, where decisionmaking by an agency head is accepted practice. The authorizing statutes of other agencies do not *bar* decisionmaking by the "agency itself," but rather *require* decisionmaking at that level. Pennsylvania has no procedures to insulate the *independence* of the Secretary's decisionmaking from the process by which the agency itself makes decisions, and even the Commonwealth refers to the Secretary and the agency interchangeably.[74]

One reason the EHA prohibits review by "the agency itself" is that the agency may be a party to the proceedings, either as a

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[73] This language supports the view of most courts that the same impartiality requirements for hearing officers apply equally to review officials. *See, e.g., Colin K. by John K.* v. *Schmidt*, 715 F.2d 1, 5 (1st Cir. 1983). Petitioners concede this point. Br. of Pet. at 62 & n.17.

[74] *See* 22 Pa. Code § 1.1 (the Department of Education and Secretary of Education are one and the same). *Compare* 22 Pa. Code § 13.32(24) ("The decision of a hearing officer may be appealed to the Secretary") *with* Draft FY 1988-89 Pennsylvania State Plan (1988) ("The decision of a hearing officer may be appealed to the [state education agency])." Both secretaries who reviewed hearing officer opinions in this case spoke not for themselves but as "we."

plaintiff joining the parent against the school district, or as a defendant, alone or with a local agency. As an "aggrieved party" it also may appeal from state hearing officer or reviewing officer decisions. *See* 20 U.S.C. § 1415(e)(2). This provision would make no sense were the Secretary to serve as review officer. Petitioner's appeal to the administrative law paradigm ignores the critical fact that while many agencies have multiple roles—as policymaker, party and adjudicator—they generally have no right to appeal their own decisions.

Moreover, the Secretary was a partial decisionmaker under the EHA because he is an "employee" of the state educational agency (even if state constitutional officers are not considered "employees" in some wholly inapplicable legal contexts) and also because he was "involved in the education or care of the child" within the meaning of the statute. Most courts, like those below, have found that supervisory officials involved in special education are not impartial under the EHA,[75] and few states besides Pennsylvania employ such a procedure. *See Amicus* Brief of ACLU *et. al.* at 19 & Exhibit A.

Third, petitioner's request that this Court allow it to use state secretary review to declare policy positions,[76] *see* Br. of

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[75] While one Senate Report stated that a hearing may not be conducted by state or local educational agency employees "*directly*" involved in the education of the child, the subsequent Conference Report deleted the word "directly." *Compare* S.Rep. 94-168 at 47, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1470, *with* S.Conf.Rep. 94-455 at 49, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1502. *Accord Robert M.* v. *Benton*, 634 F.2d 1139, 1142 (8th Cir. 1980) ("The Senate Conference Report therefore indicates that the Act, promulgated as the conference substitute for differing House and Senate versions of the bill . . . intentionally expanded its prohibition to include employees of state educational agencies not directly involved in the education of the child and so to disqualify them from serving as hearing officers under Section 1415(b)(2).").

[76] Such a regime would hold the potential routinely to circumvent Congress' interest in exhaustion of administrative remedies, since

Pet. at 65, 77-78, directly conflicts with the *modus operandi* of the Act—an *individualized* education plan—and the statutory requirement that the hearing officer's decision *independently* decide each case on its individual merits. As best it could, Congress sought to ensure attention to the inherently individual and unique nature of each child's abilities by making every effort not to permit decisionmaking by those with vested policy interests or fiscal concerns. State agencies are not of course powerless to formulate and enforce their policies; they have many other ways to achieve these goals, *see, e.g.*, 20 U.S.C. §§ 1412; 1413; 1414(b), including judicial review.

The U.S. Department of Education has concluded that in view of congressional intent, there is a very strong presumption that chief state school officers are precluded from serving as state level review officials. Department of Education, Office of Special Education *Revised DAS Bulletin No. 107* (January 16, 1984) *reprinted in* Educ. Hand. L. Rep. 203:19 (May 8, 1987). In the absence of a "clear and convincing rebuttal," the Department has stated "this presumption operates as a categorical prohibition." *Id.* In contrast to petitioner's support for review as a means of policymaking, the Department specifically warned that no review should be conducted by any state official who has been "in any way substantially involved in the development of any state or local policy or procedure which is directly or indirectly being challenged . . . ." *Id.* at 203:20. This Departmental interpretation accords with the statutory language, but even if the statutory language were ambiguous, as petitioner contends, deference would be due to the agency's views. *See Chevron U.S.A.* v. *NRDC*, 467 U.S. 837, 842-43

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such challenges would obviously be futile and thus exempt from the exhaustion requirement. *See, e.g., Burr* v. *Ambach*, No. 88-7275, slip op. at 14-15 (2d Cir. Dec. 12, 1989) (exhaustion before state commissioner of education would be futile and was not required when he was not impartial because of his extensive responsibilities and integral involvement in handicapped education).

(1984); *NLRB* v. *United Food Workers Union*, 108 S. Ct. 413, 426 (1987) (Scalia, J., concurring).

Finally, Secretary level review contravenes the Act since he and his department are potential parties to any complaint. Petitioner concedes that the Secretary would be partial when the state is a party, but suggests this will be a rare event. The admission is important because the Secretary's authority to conduct reviews is in no way limited to cases in which the state is not a party and because petitioner's assertion about the likelihood of the state being a party is plainly wrong. *See supra* pp. 36-38; *Amicus* Brief of ACLU *et al.* at 8-10.[77]

C. Violation Of The EHA's Impartiality Requirement Was Harmful To Muth, And Tuition Reimbursement Is An Appropriate Remedy.

The procedural violations caused harm to Muth. Like the other procedural violations, the absence of impartial review is

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[77] Petitioner argues in addition that despite explicit statutory language to the contrary, Congress did not intend to look beyond the exact state appeal and review procedures adopted by the district court in *Pennsylvania Ass'n for Retarded Children* v. *Pennsylvania*, 343 F. Supp. 279, 303 (E.D. Pa. 1972). This Court has already recognized that Congress adopted some provisions of *PARC* (as well as another influential case, *Mills* v. *Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972)), while rejecting others. *Honig* v. *Doe*, 108 S. Ct. 592, 605 (1987) (given Congress' close attention to *PARC*, any omission from the *PARC* procedure must have been intentional; "we are therefore not at liberty to engraft onto a statute an exception Congress chose not to create."). Although the EHA was influenced by *PARC* and *Mills*, Pennsylvania was only one of the twenty-two States and more than 100 witnesses that proffered testimony at numerous congressional hearings held across the country. S.Rep. No. 168, 94th Cong., 1st Sess., 7, *reprinted in* 1975 U.S. Code Cong. & Admin. News, 1425, 1431. The Act reflected a compromise between specific House and Senate versions and the result did not reflect the ideas of any single person, state, or judicial opinion. *See, e.g.*, 121 Cong. Rec. 19502 (June 18, 1975) (remarks of Sen. Cranston).

closely linked with the serious delays that took place. A truly impartial decisionmaker would probably not have remanded. By remanding, the Secretary saved the state and local governments from having to appear in court in a bad posture, having developed no adequate proposal to provide Alex with education. The Commonwealth's process effectively prevented judicial review of any proposal for Alex's education that was actually available for use during the 1983-1984 school year. An impartial and independent reviewing officer might well have placed more value on Muth's right to a speedy and final administrative decision.

Moreover, even apart from delay, parents have an important stake in whether the decisionmaker is independent and impartial. Because it could not specify *ex ante* the type of education appropriate to individual cases, Congress relied on procedural protections to produce the result appropriate to each case,[78] granting broad powers to decisionmakers under the Act to fashion appropriate remedies. Even where the standard for appropriate education is defined, the standard is imprecise.[79] The substance of the standard depends on the facts of the particular case. Interpretation and application of the standard relies heavily upon the judgment and discretion of the hearing officer and, where applicable, the reviewing official.

A neutral decisionmaker is important to the process because parents and government (state and local educational agencies) bring very different perspectives to the special education process. From the perspective of the parent who because of the

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[78] *See, e.g., McKenzie* v. *Smith*, 771 F.2d 1527, 1532 (D.C. Cir. 1985) ("The substance of the EAHCA is in essence embodied in the procedural mechanisms it mandates.").

[79] Even where *Rowley's* "any benefit" standard applies, for example, it would not be satisfied by hiring a "teacher with a loud voice." *Rowley*, 458 U.S. at 215 (White, J., dissenting). Similarly, states that apply a maximum benefit standard do not apply it literally. *See Geis* v. *Board of Educ.*, 774 F.2d 575, 582-83 (3d Cir. 1985).

EHA does not have to pay for his handicapped child's education, there is no amount of money that is too great to spend to help his child learn what he can. State and local governments, on the other hand, must manage a budget and have financial incentives to provide the least expensive placement (usually in the public school system) and to provide a minimum of services. The EHA says nothing about such central questions as the amount of money to which a child will be entitled to pursue his education.

The scheme of the Act is that through negotiation these two opposing viewpoints will work out an appropriate resolution. If the negotiation does not yield a solution, however, the hearing officer, and in some cases a reviewing official, must make a neutral decision between the two perspectives, or work out some fair middle alternative, in order to give substance to the central protection of the statute. In many instances, these decisions have significant financial ramifications for the state and/or local government. Pennsylvania, for example, has established a system in which the state pays 80 percent of tuition at a private school for "certain exceptional children" and the locality pays 20 percent. Stat. Ann.tit. 24, Pa. § 13.1376(a) (1988). Even if the Secretary were not an "employee" under the EHA, the fiscal implications of his decision on his agency render him an interested party under the regulations. 34 C.F.R. § 300.507(a)(2). *See Mayson* v. *Teague*, 749 F.2d 652 (11th Cir. 1984).

If the hearing officer is one of the parties—or even if he is closely fiscally linked with one of the parties, as a chief state school officer may be with the local school districts—there will be no neutrality and the parent will have the controversy decided by the state itself.

The harm Muth suffered is properly compensable by tuition reimbursement. In *Rowley*, this Court held that because the EHA's procedural safeguards are essential to assuring the rights of handicapped children and their parents, the Act's remedies are available for procedural violations. *See* 458 U.S.

at 205-206. Courts have given reimbursement for procedural violations that have caused expense to the parent, as the procedural violations did here.[80]

The issue in this case is reimbursement for a period in which the parent could not know what the outcome of the administrative proceeding would be or when it would end. After years of trying to educate Alex within the public school system, Muth reasonably placed his child in a private special needs school that was in fact extremely beneficial to Alexander during the period that the school district was not offering an appropriate education, or at least a period when he reasonably believed it was not.

Whether one examines the procedural violations as a group (for they are intertwined), or adverts alone to the partiality of the reviewing official, those illegalities caused the delay for which Muth was reimbursed and they may also have changed the result on the merits from an outcome for Landmark rather than the public school. It is appropriate to award reimbursement when egregious procedural violations have caused a parent actual harm, as they have in this case.

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[80] *See, e.g., Hall by Hall* v. *Vance County Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985) (awarding tuition reimbursement because failures to comply with EHA procedural safeguards are "adequate grounds by themselves" for holding that the right to a free appropriate education has been denied).

CONCLUSION

For the foregoing reasons, the court of appeals' award of tuition reimbursement should be affirmed.

Respectfully submitted,

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